EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
SEP 28 2001
OFFICE OF THE CLERK

No. 01-399

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA
Petitioner,

vs.

DeANDRE LAVAR LUCAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

GARRETT W. SIMPSON
Deputy Public Defender
411 N. Central Ave. No. 670
Phoenix, Arizona 85004
Attorney for *RESPONDENT*

No. 01-399

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA

Petitioner,

vs.

DeANDRE LAVAR LUCAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

ARIZONA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

GARRETT W. SIMPSON
Deputy Public Defender
411 N. Central Ave. No. 670
Phoenix, Arizona 85004
Attorney for *RESPONDENT*

QUESTION PRESENTED

Shall a patent Batson[1] violation be forgiven when the state *admits* unlawfully discriminating, but offers an additional, nondiscriminatory reason for the strike?

1 Batson v. Kentucky, 476 U.S. 79 (1986).

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES iii

CONSTITUTIONAL PROVISIONS INVOLVED.....iv

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.....1

REASONS FOR DENYING THE PETITION.....1

I. The issue presented is moot. Before petitioning for a writ for certiorari, the Order and Mandate of the Arizona Court of Appeals had issued.....1

II. No compelling grounds exist to grant a writ of certiorari since the Arizona Court of Appeals opinion is consistent with federal law. 3

III. If the writ is granted, the Court should hold that a discriminatory purpose for a peremptory jury challenge violates *Batson,* regardless if the state poses a second, non-discriminatory reason.....6

CONCLUSION.....8

TABLE OF AUTHORITIES

PAGE

CASES

Batson v. Kentucky, 476 U.S. 79 (1986) 3, 4, 5, 6, 7, 8
Hernandez v. New York, 500 U.S. 352 (1991) 7
J.E.B. v. Alamabama, ex rel. T.B.,
511 U.S. 127 (1994) 3, 5, 6, 7

CONSTITUTIONAL PROVISIONS
U.S. Const. Amend. 14 4
U.S. Const. Art. III 2

RULES
Rule 10, Supreme Court Rule 3
Rule 31.23(b)(2), Ariz. Rules of Crim. P. 2

CONSTITUTIONAL PROVISIONS INVOLVED

Article III., Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Amendment 14, Section 1.

. . . [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

DeAndre Lavar Lucas ("Lucas") respectfully requests the Court deny the petition by the State of Arizona ("State") for a writ of certiorari.

JURISDICTION

This Court lacks jurisdiction. Before applying for a writ of certiorari in August 2001, the Arizona Supreme Court denied Review and the Arizona Court of Appeals on June 22, 2001 entered its Order and Mandate (Appendix A), returning the proceedings to Maricopa County (Arizona) Superior Court for a new trial.

REASONS FOR DENYING THE PETITION

I. The issue presented is moot. Before petitioning for a writ of certiorari, the Arizona Supreme Court denied Review and the Arizona Court of Appeals entered an Order and Mandate returning the proceedings to Maricopa County Superior Court for a new trial.

The Arizona Court of Appeals issued its opinion in this case on February 13, 2001 (*See,* Petitioner's Appendix A). The Arizona Supreme denied review May 23, 2001, returning the

matter to the Arizona Court of Appeals (*See* Petitioner's Appendix B). However, the Petitioner never sought stay of the Arizona Court of Appeals and on June 22, 2001 it issued its Order and Mandate (Respondent's Appendix A).

The prosecution could have sought a stay of the issuance of the state court mandate pursuant to *17 A.R.S., Arizona Rules of Criminal Procedure, 31.23(b)(2)*, but did not (Respondent's Appendix B).

Lucas acknowledges the state filed it's Petition within 90 days of denial of review by the Arizona Supreme Court. But he submits that this Court should not entertain jurisdiction in a case where proceedings are final on appeal. The state has in effect waived its right to seek certiorari. Likewise, the state has no authority to request this Court to provide an advisory opinion. The state chose not to seek a stay. Once a mandate is issued, the appellate process is concluded. The issue the state brings to the Court is no longer a "case" or "controversy" as required for jurisdiction by Article III of the Constitution. Any attempt to renew the case would profoundly prejudice Lucas's constitutional right to due process and equal protection of law because the state's issue is final on appeal and moot.

II. **No compelling grounds exist to grant a writ of certiorari since the Arizona Court of Appeals opinion is consistent with *Batson*. It merely held that the State may not engage in patent, unlawful discrimination in the jury selection process, even if it offers a second, non-discriminatory reason for the strike.**

Apart from mootness, there is no compelling reason to grant the state's petition. Supreme Court Rule 10 sets forth the limited circumstances in which this Court will exercise its discretionary powers in granting a petition for writ of certiorari. A careful reading of the opinion (Petitioner's Appendix A) shows this case does not fall under Rule 10.

The Arizona Court of Appeals Opinion does not misapply or conflict with *Batson v. Kentucky,* 476 U.S. 79 (1986), nor with *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

As set out in the Arizona Court of Appeals's opinion (Petitioner's Appendix A), DeAndre Lucas, who was 18 years-old at the time of the crime, testified he was only trying to take the victim's purse when he encountered her. She contended, in spite of this, that he kidnapped her and tried to sexually assault her. Lucas was convicted as charged and he was sentenced to 17 flat years in prison (Petitioner's Appendix A-2). However, during jury selection, the state struck a potential juror with a peremptory challenge. Lucas objected, citing *Batson*, because

Mr. Lucas is black and the potential juror was the only African-American male on the panel. The state countered it struck the potential juror *not* because he was black, but rather because he was a lawyer and because, the prosecutor stated, he was a "southern male," a male who likely harbored, she said, latent animosity towards women—such as the prosecutor herself—who worked while pregnant. (Petitioner's Appendix A-4).

The trial court overruled Lucas's *Batson* objection because it's second reason—the juror's occupation—was neutral. But the Arizona Court of Appeals dismissed the non-discriminatory reason for the strike. It found that under *Batson,* once the court discerns an inherent or pretextural reason for the strike rooted in unlawful discrimination, any other non-discrimnatory reason stated for the strike is tainted. (Petitioner's Appendix A-6). In *Batson,* this Court held that the equal protection clause of the Fourteenth Amendment governs the exercise of peremptory challenges.

The Court held that a "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," 476 U.S., at 85-86. This Court has long "recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-

sponsored group stereotypes rooted in, and reflective of, historical prejudice," *id.*

Lucas submits the decision below is harmonious with *Batson* because the court rebuked the state for employing a "state-sponsored group stereotype" in its jury selection procedure that violated Lucas's right to have the jury selected by non-discriminatory criteria.

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), this Court extended *Batson* to prohibit gender bias in the use of peremptory strikes:

"We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality," 511 U.S. 128-129.

The opinion below is congruent with *J.E.B.* because, as with *Batson*, *J.E.B.* extends to gender the right to have a jury selected with non-discriminatory criteria. In Lucas's case, the state discriminated against the potential juror explicitly and nastily, one must say, on the basis of gender, i.e., a state-sponsored group stereotype.

Since the opinion of the Arizona Court of Appeals does not conflict with *Batson* or *J.E.B.* there is no reason to grant the writ of certiorari.

III. **If the writ is granted, the Court should hold that a discriminatory purpose for a peremptory jury challenge violates *Batson*, regardless if the state poses a second, non-discriminatory reason.**

The petitioner offers a dismal vision for jury selection. It asks this Court to allow the state to engage in egregious, manifest discrimination, so long as it may reach for the fig leaf of a secondary motive.

This so-called "dual motivation" theory makes mock of the heart of *Batson*. *Batson*'s very point is to see that members of the defendant's race—or gender, *J.E.B.*—are not victims of "purposeful discrimination" that excludes them from the jury, 476 U.S. 93. What becomes of that criterion where the unlawful exclusion on the basis of gender is out-front, explicit—even exulted—but nevertheless excused because the juror was also struck because he or she was a vegetarian, or a Fabian, or a member of the A.A.R.P.?

Batson's quest can be stated, "[T]he ultimate issue is whether the state has discriminated in selecting the defendant's venire," 476 U.S. 94. What becomes of that mission if a prosecutor may brazenly state, "Why, of course I have a problem with Arab women, such as Mrs. Ali, serving on my juries, but I also struck her because she never finished high school."? Batson says that discrimination ". . . undermines

public confidence in the fairness of our system of justice." *J.E.B.*, 511 U.S. at 142, *fn.* 13. Allowing "dual motivation" would *cripple* public confidence in the American system of justice. It would put courts in the dreadful position of welcoming overt racism and sexism in the selection of juries, so long as there was a second, non-discriminatory reason stated for the strike. Another cardinal flaw behind the dual motivation cases cited by the state is that they do not consider properly *Batson's* third step. This end game is where the trial court weighs the reason or reasons for the strike and determines whether the opponent has carried the burden of showing purposeful discrimination, *see,* e.g., *Hernandez v. New York,* 500 U.S. 352, 359-360 (1991). If the state *concedes* unlawful discrimination, under *Batson*—as happened in Lucas's case—there is nothing to be weighed. There is no issue that the state was *not* purposefully discriminating and the existence of an ancillary, non-discriminatory motive is completely beside the point.

Further, to state that a second, non-discriminatory purpose could ever trump the strike's overt racism or unconcealed gender bias flatly contradicts *Batson's* purpose.

Finally, put aside whether the discriminatory intent behind Reason #1 was overt or pretextural. A rational trier of

fact should give no weight at all to Reason #2, the "neutral" non-discriminatory reason, if the state has confessed that its Reason #1 was product of its own bald-faced, unlawful bias. Likewise, no weight should be given to reason #2—however "neutral"—where the court finds that Reason #1 was a pretext and that in fact the state unlawfully discriminated.

Lucas respectfully asks the Court to reject the Petition and not issue the writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied because the issue is moot. Further, the Arizona Court of Appeals opinion does not violate *Batson,* nor the opinions of this Court that followed. Finally, should the Court take this case, it should reject "dual motivation" as a means of avoiding the natural and logical consequences of a *Batson* violation.

Respectfully submitted,

GARRETT W. SIMPSON
Deputy Public Defender
(Counsel of Record)
411 North Central, No. 670
Phoenix, Arizona 85004
(602) 506-0920
Counsel for RESPONDENT

APPENDIX A

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. **DeANDRE LAVAR LUCAS,** Appellant.	No. 1 CA-CR 97-0567 DEPARTMENT B Maricopa County Superior Court No. CR-99-90354

ORDER and MANDATE

Janet A. Napolitano, The Attorney General
By: Randall M. Howe, Chief Counsel,
Criminal Appeals Section
Consuelo M. Ohanesian, Assistant Attorney General and
James P. Beene, Assistant Attorney General,
Attorneys for Appellee

Maricopa County Public Defender
By: Garrett W. Simpson, Deputy Public Defender
Attorneys for Appellant

The opinion of this Court in the above matter was filed on February 13, 2001.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated May 23, 2001, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR-01-0096-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on June 22, 2001. A copy of the ORDER and MANDATE and a copy of the opinion were mailed to the Honorable Barabara M. Jarrett, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

MARICOPA County
Superior Court
No. CR 99-90354

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of the Superior Court, all records, exhibits, and other matters received form said Clerk of the Court in aid of the consideration of this matter.

DATED June 22, 2001.

/s/ Edward C. Voss
VICE CHIEF JUDGE

All of the foregoing directives were complied with June 22, 2001.

GLEN D. CLARK, Clerk
By

/s/ Barbara J. Hill
Deputy Clerk

APPENDIX B

17 A.R.S., Arizona Rules of Criminal Procedure, Rule 31.23(b) states:

(b) Stay of Mandate Pending Application for Certiorari.

(1) *Automatic Stay in Capital Cases Affirming Death Sentence.* The clerk of the Supreme Court shall issue the mandate in capital cases when the time for filing a petition for writ of certiorari in the United States Supreme Court from the decision affirming the defendant's conviction and sentence on direct appeal has expired, or, in a case in which a petition for writ of certiorari has actually been filed, when the clerk of the Supreme Court is notified by the United States Supreme Court that the petition has been denied. The filing of a petition for rehearing of the denial of a petition for writ of certiorari shall not delay the issuance of the mandate.

(2) *In All Other Cases.*

(i) A stay of the issuance of the mandate of either the Court of Appeals or the Arizona Supreme Court pending application to the United States Supreme Court for a writ of certiorari may be granted upon request.

(ii) An application for a stay of the issuance of a mandate of the Arizona Supreme Court may be filed with the clerk of the Arizona Supreme Court within 15 days after the filing of the court's opinion, memorandum decision or order denying a motion for reconsideration.

(iii) An application for a stay of the issuance of a mandate of the Court of Appeals may be filed with the clerk of the Court of Appeals within 15 days after an order of the Supreme Court denying a petition for review, or in any other situation requiring the Court of Appeals to issue a mandate.

(iv) The stay shall not exceed 90 days unless the period is extended for cause shown. If, during the period of the stay, there is filed with the clerk of the appropriate court a notice that the party who has obtained the stay has filed a petition for a writ of certiorari, the stay shall continue until the clerk is notified by the United States Supreme Court that the writ has been denied or, in a case in which the writ has been granted, that a mandate has been issued by the United States Supreme Court.

No. 01-399

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,

Petitioner,

vs.

DeANDRE LAVAR LUCAS,

Respondent.

PROOF OF SERVICE

I, Garrett W. Simpson, do certify that on this 28th Day of September 2001, as required by Supreme Court Rule 29, I served the foregoing Respondent's Brief In Opposition on all parties required to be served by depositing an envelope containing these documents in the United States Mail, first-class postage prepaid, and addressed to counsel for the State of

Arizona, Consuelo M. Ohanesian, Assistant Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007.

I declare under penalty of perjury that the foregoing is true and correct.

MARICOPA COUNTY PUBLIC DEFENDER

By_____

GARRETT W. SIMPSON
Deputy Public Defender
(Counsel of Record)
411 N. Central, Suite 670
Phoenix, Arizona 85004
(602) 506-0920
Counsel for RESPONDENT